

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re:

Annual Assessment of the Status of
Competition in the Market for the
Delivery of Video Programming

CS Docket No. 95-61

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REPLY COMMENTS OF ESPN, INC.

Edwin M. Durso
Executive Vice President & General Counsel
Michael J. Pierce
Counsel
ESPN, Inc.
ESPN Plaza
Bristol, Connecticut 06010-7454

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To the Commission:

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REPLY COMMENTS OF ESPN, INC.

In comments filed earlier in this proceeding ESPN, Inc. ("ESPN") registered its strong objections to any extension of the program access rules to nonvertically integrated programmers.¹ Two other commenters, however, have taken the opposite -- and, in our opinion, untenable -- position that Congress should amend Section 628 of the Communications Act to apply the program access provisions to nonvertically integrated programmers.² For the reasons stated in our previously filed Comments, we again urge the Commission to flatly reject these few misguided calls for intrusive regulatory oversight of an already functioning marketplace. For the sake of a complete record, however, ESPN responds below to the arguments and allegations made in comments

¹ Two other parties with programming interests also submitted comments consistent with ESPN's position. See Comments of Lifetime Television and Comments of Group W Satellite Communications. ESPN supports the positions taken by Lifetime and Group W in opposing any extension of the program access rules to nonvertically integrated programmers.

² See Comments of The Wireless Cable Association International, Inc. ("WCAI Comments") and Comments of National Cable Television Cooperative, Inc. ("NCTC Comments").

submitted by the National Cable Television Cooperative, Inc. (“NCTC”) and the Wireless Cable Association International, Inc. (“WCAI”).

I. NCTC Ultimately Proposes that the Commission Insulate Small Cable Operators from Competition from Emerging Technologies

The NCTC Comments generally urge the extension of the program access rules to nonvertically integrated programmers (without, however, specifying the mechanism for doing so).³ In doing so, however, NCTC has seriously misconstrued the intent of the original program access provisions and ignored the extensive legislative history that accompanied their passage and implementation. Instead, NCTC appears to seek an “insurance policy” from the Commission with respect to competition from new technologies. As discussed more fully below, ESPN strongly urges the Commission to decline the interventionist role proposed for it by NCTC.

The cornerstone of NCTC’s argument is its belief that “[i]n the competitive environment evolving in the video programming industry, members of NCTC are likely to be those most severely impacted by increasing competition.”⁴ While ESPN is not in a position to assess the competitive impact of emerging technologies *vis-à-vis* small cable systems, we do not believe the Commission’s mandate includes micromanaging distributor-vendor relationships to maximize the competitive position of smaller cable operators.⁵ Further, in view of NCTC’s apparent misconceptions regarding the prices

³ The NCTC Comments are most logically read as encouraging the Commission to recommend to Congress that Section 628 of the Communications Act be extended to nonvertically integrated programmers.

⁴ *NCTC Comments* at 4 (footnote omitted).

⁵ NCTC’s assertion that the Commission has “modified the applicability of certain rules” to smaller cable systems is irrelevant and misleading. *NCTC Comments* at 4, n. 2. While the Commission has attempted to reduce regulatory burden on small systems, it has not

paid for programming by newer technologies, the Commission should be even more wary of assuming the part cast for it by NCTC.

Without citing any specific data, NCTC claims that small cable operators pay more for programming than emerging technologies such as “direct satellite video distribution.” However, even after admitting that it does not have any direct knowledge of these alleged price differences, NCTC makes the extraordinary leap in logic that because the retail rates satellite distributors charge their subscribers seem low, these emerging distributors must be extracting significant price concessions from nonvertically integrated programmers.⁶ As the Commission fully appreciates, programmers like ESPN do not involve themselves in the pricing decisions of their distributors. Further, ESPN does not accept NCTC’s unsupported assertion that nonvertically integrated programmers automatically charge lower prices to emerging satellite distributors than they charge to small cable operators. NCTC’s belief that DBS providers currently pay less for nonvertically integrated programming services than small cable operators is, at least in the case of ESPN, untrue.⁷

done so by increasing the regulatory burden on other entities -- particularly vendors -- as NCTC recommends that it do in this proceeding.

⁶ See *NCTC Comments* at 5 (“Although NCTC does not know the precise wholesale rates charged by these providers to entities such as DirecTV, the retail rates charged by DirecTV are such that it is likely that the wholesale pricing to DirecTV is less than the pricing to NCTC members. These rates are probably not, however, significantly lower than the pricing afforded to large MSOs that are able to negotiate with the programming providers as a representative of significant number of subscribers.” (emphasis added)).

⁷ In addition to its speculative nature, NCTC’s analysis also fails to take into account the fact that DBS distributors like DirecTV pass along the capital costs of equipment to their subscribers (requiring them to buy or lease satellite dishes and receivers). Consequently, these distributors may already be limited *vis-à-vis* cable operators in what they can charge subscribers for programming services. This may account in part for NCTC’s apparent perception that DirecTV charges its subscribers less for programming than what NCTC’s members charge their subscribers.

Putting innuendo and rhetoric aside, NCTC simply seeks to hold ESPN and other nonvertically integrated programmers responsible for the fact that satellite distribution services appear to be making gains at the expense of small cable systems in rural areas. As NCTC itself points out, these newer services are likely to succeed “as a result of limited coverage and, in some cases, technical capability limitations of the smaller [cable] systems serving those rural areas.”⁸ While ESPN would prefer to see every video distributor succeed, we do not believe the Commission should mandate that outcome either through administrative rulemakings or legislative recommendations. Extending the program access rules to nonvertically integrated programmers will not erase the “limited coverage” and “technical capability limitations” that currently disadvantage the small cable operator. If these distributors find themselves suddenly unable to compete in areas in which they have long been the monopoly video provider, their problems are likely much more serious than those allegedly resulting from their dealings with nonvertically integrated programmers.⁹

As the legislative history of the program access provisions makes clear, Congress sought to limit the actions of specific actors in the programming marketplace that it concluded have the incentive and ability to disfavor competitive distributors. Whatever the wisdom of the original legislation, NCTC’s transparent attempt to transform those provisions into a shield against the negative impact of competitive intrusion is absolutely unwarranted. ESPN urges the Commission to firmly reject NCTC’s proposition.

⁸ *Id.* at 5.

⁹ At bottom, ESPN submits that NCTC simply seeks the Commission’s imprimatur on aggregating the buying power of its individual members and achieving the kind of monopsony power discussed at length in the WCAI Comments.

II. There is No Logical Nexus Between Extending the Program Access Rules to Nonvertically Integrated Programmers and WCAI's Conclusion That Monopsony Power Exists in the Programming Marketplace

Like the NCTC, WCAI recommends that Congress extend the current program access provisions of the 1992 Cable Act to nonvertically integrated programmers. However, although different in tenor from the NCTC Comments, WCAI essentially asks the Commission to assume the same interventionist role in this marketplace and similarly ignore the extensive legislative history and Congressional and administrative underpinnings for the current program access provisions.¹⁰

According to WCAI, “events since the passage of the 1992 Cable Act demonstrate that loopholes exist which can be taken advantage of to deprive emerging multichannel video programming distributors (“MVPDs”) of fair access to programming.”¹¹ Although it is not clear from the *WCAI Comments* what those “events” were, for WCAI it is but a short step to the conclusion that Congress must amend Section 628 of the Communications Act to extend the program access provisions to nonvertically integrated programmers.¹²

In marked contrast to the major impact this proposal would have on the programming marketplace (or perhaps because of it), WCAI devotes surprisingly little attention to the matter in its Comments. Instead, the WCAI Comments rely almost

¹⁰ See *WCAI Comments* at 16. Demonstrating a mastery of understatement, WCAI recommends that Congress “fine tune” the “loopholes” and “flaws” in the 1992 Cable Act by extending its program access provisions to nonvertically integrated programmers. Rather than a mere “fine tuning,” however, ESPN believes this step would require Congress to overturn its own findings, and the Commission to ignore an already extensive legislative and administrative record that examined the extent and impact of vertical integration in this marketplace.

¹¹ *Id.*

¹² *Id.*

entirely on an article recently appearing in the *Federal Communications Law Journal* by Professor David Waterman of Indiana University.¹³ ESPN believes, however, that WCAI has misstated and/or ignored the more salient conclusions contained in Professor Waterman's article.¹⁴

For the record, Professor Waterman's Article does state that the Commission's program access regulations should apply to all program suppliers -- "regardless of the ownership relations those suppliers may have with cable systems, or with any other MVPDs."¹⁵ However, WCAI's terse summation of the Article fails to include any of the discussion that qualifies Professor Waterman's conclusion, *e.g.*, that the wisdom of the program access rules themselves may appropriately be questioned.¹⁶ More notably, the WCAI Comments fail completely to deal with the Article's most salient conclusion:

The focus by Congress on the potentially anticompetitive effects of vertical relationships in cable, however, diverts attention from the more fundamental source of whatever excessive market power that may exist in this industry -- horizontal market power at the MSO level The issue upon which policymakers must focus in achieving [effective competition] is not vertical integration, but the sources of market power at the MSO level.¹⁷

¹³ Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 Fed. Comm. L.J. 511 (1995).

¹⁴ We also note that Exhibit B of the Waterman Article incorrectly identifies ESPN as a cable network that has a vertical relationship with a cable MSO.

¹⁵ 47 Fed. Comm. L.J. at 514.

¹⁶ As WCAI writes: "Given the structure of the marketplace as discussed by Prof. Waterman, his conclusion that program access should apply equally to all program suppliers is obviously correct." *WCAI Comments* at 18. However, Professor Waterman notes: "There may be many questions about the wisdom of the FCC's program access regulations in general. The rules are bound to infringe, for example, on whatever efficiency benefits that exclusive dealing may bring. One can also cite administrative burdens on the FCC, and especially, one can question whether the FCC has the necessary expertise and information to make appropriate judgments in access cases." *Id.* at 528.

¹⁷ *Id.* at 531 (emphasis added).

Waterman appears to conclude that the presence or absence of vertical integration is not a factor in determining prices to alternative MVPDs.¹⁸ Rather, the Article portrays pricing differentials as the result of varying degrees of monopsony power on the part of cable operators in the programming marketplace.¹⁹

Even assuming, *arguendo*, that Professor Waterman's conclusion is correct, ESPN fails to see any logical nexus between the assertion that monopsony power exists in the programming marketplace and the wisdom of extending the program access provisions of the 1992 Cable Act to nonvertically integrated programmers. If, in fact, large cable MSOs receive lower prices due to their monopsony power, extending the program access rules to nonvertically integrated programmers would seem to be a clear and unambiguous case of "punishing the victim." As Professor Waterman notes, monopsony power is "the power to force the price of an input (in this case a cable network), below competitive levels, and thus make excess profits."²⁰ It is a strange logic indeed that would place increased regulatory constraints on those parties whose prices have already been driven "below competitive levels" and leave unaffected those parties making "excess profits" at the expense of the newly regulated.²¹

¹⁸ *Id.* at 528.

¹⁹ Moreover, Professor Waterman's point that there may be "varying degrees of monopsony power" seems to indicate that even small cable operators, acting (as many do) as monopoly video providers in their local markets, have monopsony power in their own right.

²⁰ 47 Fed. Comm. L.J. at 526, n. 62.

²¹ Professor Waterman's Article also does not address the fact that the programmer-MVPD bargaining process involves much more than simple price negotiation. As the Article itself intimates, however, there may be many elements of bargained-for consideration in a programming agreement: "Network-affiliate contracts specify confidentiality and are complex, often defining sliding scale input pricing formulas and other terms and conditions such as the sharing of marketing responsibilities." *Id.* at 525 (footnote omitted). Regardless of the presence or absence of monopsony power.

CONCLUSION

ESPN was not surprised that the Commission's request for comments on extending the program access rules to nonvertically integrated programmers generated little support. And, at least in the case of NCTC, those supporting such an extension seem to do so as a response to increased competition from even newer technologies. ESPN again, therefore, strongly urges the Commission to flatly reject the call to unnecessarily and inappropriately intrude on the vendor-distributor relationship and add new regulatory burdens on unaffiliated programmers. Moreover, we believe the Commission should affirmatively look for ways to limit the intrusiveness of the current program access rules into the marketplace and/or to recommend to Congress that they be eliminated entirely.

Respectfully submitted,

ESPN, Inc.

By 

Edwin M. Durso

Michael J. Pierce

ESPN, Inc.
ESPN Plaza
Bristol, Connecticut 06010-7454
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Professor Waterman does not account for the simple fact of life that large distributors receive better pricing because, in return, they provide significantly more advantageous commitments and benefits to programmers than do smaller distributors.